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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15 VERNON UNSWORTH,
16 Plaintiff,
17 vs.
18 ELON MUSK,
19 Defendant.

Case No. 2:18-cv-08048

Judge: Hon. Stephen V. Wilson

**DEFENDANT ELON MUSK'S
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE PARTIAL
SUMMARY JUDGMENT**

Complaint Filed: September 17, 2018
Trial Date: December 2, 2019

Hearing Date: October 28, 2019
Time: 1:30 p.m.
Courtroom: 10A

1 PLEASE TAKE NOTICE that on October 28, 2019 at 1:30 p.m. in Courtroom
2 10A of the above-titled Court, Defendant Elon Musk Defendant will move this Court
3 for an order granting summary judgment in favor of the Defendant, pursuant to Rule
4 56(a) of the Federal Rules of Civil Procedure, on the grounds that the action has no
5 merit, there is no triable issue as to any material fact, and Defendant is entitled to
6 judgment as a matter of law.

7 In the alternative, Defendant Elon Musk will move this Court for an order
8 granting partial summary judgment pursuant to Federal Rules of Civil Procedure,
9 Rule 56(a) and (g), on certain parts of Plaintiff's claim for defamation, on the grounds
10 that these parts of Plaintiff's claim have no merit, there is no triable issue as to any
11 material fact, and Defendant is entitled to partial judgment as a matter of law.
12 Specifically, Defendant seek the following determinations:

- 13 1. that Plaintiff is a limited purpose public figure for purposes of his
14 defamation claim;
- 15 2. that an article published on the BuzzFeed website, on September 4,
16 2018, as reflected in Exhibit K to the Complaint, does not constitute
17 defamation by Mr. Musk;
- 18 3. that the tweet made by Mr. Musk as reflected in Exhibit B to the
19 Complaint does not constitute defamation by Mr. Musk;
- 20 4. that the tweet made by Mr. Musk as reflected in Exhibit C to the
21 Complaint does not constitute defamation by Mr. Musk;
- 22 5. that the tweet made by Mr. Musk as reflected in Exhibit D to the
23 Complaint does not constitute defamation by Mr. Musk;
- 24 6. that the tweet made by Mr. Musk as reflected in Exhibit E to the
25 Complaint does not constitute defamation by Mr. Musk;
- 26 7. that the tweet made by Mr. Musk as reflected in Exhibit F to the
27 Complaint does not constitute defamation by Mr. Musk;
- 28 8. that the tweet made by Mr. Musk as reflected in Exhibit G to the

1 Complaint does not constitute defamation by Mr. Musk;

2 9. that the tweet made by Mr. Musk as reflected in Exhibit I to the

3 Complaint does not constitute defamation by Mr. Musk.

4 This motion is made pursuant to this Notice of Motion and Motion, the
5 concurrently-filed Memorandum of Points and Authorities, the Statement of
6 Uncontroverted Facts and Conclusions of Law, the Declarations of Elon Musk, Jared
7 Birchall, and Michael Lifrak (and all exhibits thereto), the [Proposed] Order Granting
8 Mr. Musk's Motion for Summary Judgment or in the Alternative Partial Summary
9 Judgment, the files and records in this action, and any such additional argument or
10 materials as may be submitted to the Court before the time of the decision in this
11 matter.

12 This motion is made following the conference of counsel pursuant to C.D. Cal.
13 L.R. 7-3, which took place in person on September 9, 2019.

14
15 DATED: September 16, 2019

Respectfully submitted,

16 QUINN EMANUEL URQUHART &
17 SULLIVAN, LLP

18
19
20 By /s/ Alex Spiro

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INTRODUCTION

The question for the Court on this motion is whether Plaintiff Vernon Unsworth has the right to have a jury decide whether Defendant Elon Musk defamed him in an article published by BuzzFeed News and in some tweets. He doesn't.

First, Mr. Musk based his comments to BuzzFeed on what a private investigator said about Mr. Unsworth, both in written reports and by phone, based on an investigation he claimed to have undertaken in Thailand and England. The investigator reported that Mr. Unsworth was a fixture in Pattaya Beach, Thailand—a locale notorious for prostitution and child trafficking, that he had a taste for young Thai girls, that he whore-mongered his way through the go-go bars of Thailand, that his only friends were his “sexpat” peers, and that he married his Thai wife when she was a teenager, after starting a relationship when she was a young girl. Mr. Musk sent an email to BuzzFeed repeating some of this information, making clear it could not publish any of his statements because they were “off the record.” He implored BuzzFeed to further investigate, and he believed they would do so rather than simply publish his concerns. To avoid summary judgment, Mr. Unsworth must prove that it was “reasonably foreseeable” to Mr. Musk that BuzzFeed would ignore his instructions, be unable to confirm the matters in his email, but publish his “off the record” remarks anyway. Mr. Unsworth has no such evidence.

Second, Mr. Musk had a constitutionally-sufficient basis to say what he said to BuzzFeed. Although it turns out that the investigator lacked solid evidence of Mr. Unsworth's behavior, that does not matter here. To avoid summary judgment, Mr. Unsworth must show actual malice. He must prove, by clear and convincing evidence, either that Mr. Musk knew the investigator was wrong, or that Mr. Musk entertained serious doubts about what he'd been told. This is a subjective standard, focused solely on Mr. Musk's knowledge and state of mind. Given the information Mr. Musk had received, Mr. Unsworth cannot meet his burden.

1 **Third**, as to the tweets, Mr. Musk posted them only after Mr. Unsworth
 2 attacked Mr. Musk on CNN, without cause, by saying that Mr. Musk’s Herculean
 3 efforts to help with the rescue of twelve Thai boys trapped in a cave “had absolutely
 4 no chance of working,” that Mr. Musk’s efforts were nothing more than a “PR stunt,”
 5 that Mr. Musk was quickly asked to leave the rescue area, as “he should have been,”
 6 and that he “*can stick his submarine where it hurts.*” Mr. Musk responded in kind to
 7 Mr. Unsworth, a man who abandoned his wife and daughter in England to live in an
 8 area of Thailand known for sex trafficking, who is not a diver, and who did not even
 9 participate in the actual rescue dives. Mr. Musk detailed the costly efforts he and his
 10 team made, for altruistic reasons; he defended the usefulness of their contributions;
 11 and he dismissed Mr. Unsworth as “sus” and a “pedo guy.”

12 Mr. Unsworth cannot meet his burden to prove actual malice as to being called
 13 “sus” or a “pedo guy.” The Court has held that the tweets “could be construed as
 14 *either* fact or opinion.” (Dkt. 42, at 13 fn. 9). To show actual malice, Mr. Unsworth
 15 must prove, by clear and convincing evidence, that, **subjectively**, Mr. Musk knew or
 16 believed that readers would view such ambiguous statements as facts. Mr. Unsworth
 17 has no such evidence. Mr. Musk testified that he believed the statements to be
 18 throwaway insults and did not intend or expect them to be viewed as fact.

19 Thus, Mr. Unsworth has no case. The motion boils down to this: Mr.
 20 Unsworth cannot establish a defamation case just because Mr. Musk insulted him on
 21 Twitter and sent a private email to a reporter. The Constitution does not allow
 22 that. The Court should grant summary judgment.

23 **STATEMENT OF RELEVANT FACTS¹**

24 **A. The Thai Cave Rescue and Plaintiff’s Role.**

25 On June 23, 2018, twelve members of a Thai youth soccer team and their coach
 26 went missing in the Tham Luang Cave System in Thailand’s Chiang Rai province.

27 ¹ References to the Statement of Uncontroverted Facts are indicated as “SUF.”
 28 Where there is no citation to the SUF, the information is cited for background only.

(SUF 1; Compl. ¶ 23). Within days, an international search and rescue mission began. (SUF 2; Compl. ¶¶ 2, 3, 23-61). The story of the stranded boys and the efforts to rescue them captured the world's attention. (SUF 3; Compl. ¶¶ 2, 3, 23-61).

On June 24, Mr. Unsworth traveled to the cave system. He is a caver who, among others, had mapped and was familiar with it. (Compl. ¶ 27). He contacted divers and advised the rescue team about where the missing boys might be found. (*Id.* ¶ 41). Beyond that, he did not assist in the rescue or participate in any of the cave diving necessary to the rescue. (*Id.* ¶ 52). And he certainly did not put his life at risk, as so many others did.

Despite his limited role, Mr. Unsworth assumed a very public part in the media coverage. As early as June 29, 2018, Mr. Unsworth was interviewed by the BBC on the status of the rescue efforts. (SUF 6; Lifrak Decl. ¶ 3). He was quoted and profiled in a number of other publications, both during and after the rescue, including in *The Daily Mail*, the *New York Times*, *The Sunday Times*, and CNN. (SUF 7-10; Lifrak Decl. Exs. 6-9). By Mr. Unsworth's own admission, his "face was very well-known to reporters." (SUF 12; Unsworth Depo. at 292:11-18).²

B. Mr. Musk's Efforts to Assist in the Rescue

Mr. Musk did not insert himself into the rescue. He was asked to help, and he did. On July 3, 2018, when a Twitter user asked Mr. Musk to assist, Mr. Musk responded that he was "happy to help if there is a way to do so." (Musk Decl. ¶¶ 4-5; Exs. A-B). Mr. Musk then inquired with Thai officials, Thai companies, and the

² In the year since the rescue, and well after Mr. Musk said the things about Mr. Unsworth that he claims ruined his reputation, he has remained a prominent figure in the rescue and has continued to give interviews and speeches about it. In December 2018, *GO Magazine* profiled him in its "Men of the Year" edition. (SUF 11; Lifrak Ex. 7). In June 2019, Queen Elizabeth elevated Mr. Unsworth to a "Member of the Most Excellent Order of the British Empire." (SUF 13; Unsworth Depo. 102:2-15). He also participated in two National Geographic documentaries about the rescue. (SUF 14; Lifrak Ex. 9). He has contributed to three books about it, including *The Boys in the Cave* by an ABC News reporter. (SUF 15; Lifrak Ex. 9). He has also given speeches and presentations about the rescue to schools, banks, and foreign ministers. (SUF 19; Lifrak Ex. 9). He has also spoken with an agent to help him negotiate rights. (SUF 20; Lifrak Ex. 13).

1 rescue divers at the cave site to see if he could assist. (*Id.* ¶ 6).

2 After getting confirmation that assistance would be useful, Mr. Musk got to
3 work. (*Id.* ¶ 7). He immediately mobilized **a team of 50** of his top engineers,
4 manufacturers, and logistical specialists at SpaceX, Tesla, and The Boring Company
5 to help rescue the stranded boys. (*Id.* ¶ 8). Their only interest was to perform an act
6 of charity—to apply their skills, technology, and resources to save lives.

7 Mr. Musk dispatched engineers to Thailand to obtain technical data about the
8 rescue and formulate a plan. (*Id.* ¶ 9). Based on what they learned about the
9 constantly changing conditions in the cave, Mr. Musk and his team worked on three
10 primary rescue strategies: surveying the cave to potentially drill to the trapped boys,
11 providing back-up power sources and water pumps if the weather conditions
12 worsened, and creating three different versions of a mini-submarine that could be
13 used to ferry those trapped through the flooded cave to safety. (*Id.*).

14 Between Friday July 6 and Sunday July 8, a team of engineers from SpaceX
15 (including Mr. Musk) worked on designing, manufacturing, and testing the mini-
16 submarines, based on input from Richard Stanton, the head of the British dive team
17 leading the rescue. (*Id.* ¶¶ 10, 13). The team worked 24-hours a day, and most did
18 not leave the SpaceX facility, other than to obtain parts or perform pool tests.

19 On July 8, Thai and British divers successfully rescued an initial group of boys.
20 (Compl. ¶¶ 54-65). That day, Mr. Musk asked Mr. Stanton if the mission still needed
21 his assistance. (Musk Decl. ¶ 11, Ex. C). Mr. Stanton responded that “it is absolutely
22 worth continuing with the development of the system,” and told Mr. Musk that “[i]f
23 the rain holds out [the submarine] may well be used.” (*Id.*). Mr. Musk and his team
24 worked around the clock, finished the most promising versions of the mini-
25 submarine, and flew with them for 18 hours to Chiang Rai. (*Id.* ¶ 13).

26 Ultimately, the monsoon rains held off, the pumps continued to work, and the
27 team was rescued without use of the mini-submarine. (Compl. ¶¶ 65-69; Musk Decl.
28 ¶ 14). Nonetheless, Mr. Musk donated the submarines and ten power cells to the Thai

1 Navy for use in future rescue missions. (Musk Decl. ¶ 15). The Thai prime minister
2 personally thanked Mr. Musk for his assistance. (*Id.* ¶ 16, Ex. D).

3 **C. Without Provocation, Mr. Unsworth Attacks Musk on CNN.**

4 The story should have ended there, with the successful rescue of the boys and
5 their coach. But it did not. On July 13, 2018, Mr. Unsworth gave an interview to
6 CNN International. (SUF 32; Unsworth Depo. 213:22-214:5). The reporter asked
7 him what his “thoughts on Mr. Musk’s idea was.” (SUF 34; Lifrak Ex. 21). ***Mr.***
8 ***Unsworth went on the attack.*** He smirked and said that Mr. Musk “can stick his
9 submarine where it hurts.” (*Id.*). He stated that the submarine “had absolutely no
10 chance of working,” “wouldn’t have gone round any corners or round any obstacles,”
11 and “wouldn’t have made the first fifty meters into the cave.” (*Id.*). He claimed that
12 Mr. Musk was “asked to leave [the rescue site] very quickly, as he should have been.”
13 He dismissed Mr. Musk’s efforts as “just a PR stunt.” (*Id.*).

14 **D. Mr. Musk’s July 15, 2018 Tweets.**

15 On July 15, 2018, Mr. Musk saw Mr. Unsworth’s CNN interview. (SUF 35).
16 Given the altruistic motives that had inspired his and his colleagues’ huge
17 commitment of time and resources, and the fact that he had never met nor even heard
18 of Mr. Unsworth, he was stunned. Mr. Unsworth had gone out of his way to falsely
19 and profanely challenge his and his co-workers’ efforts and motives in an interview
20 broadcast around the world. Mr. Musk had dropped what he was doing, diverted the
21 work of dozens of his top engineers, donated all of their time and materials, overseen
22 the design, manufacture, and testing of submarines, flown them to the cave system,
23 and delivered them to the Thai government. (Musk Decl. ¶¶ 6-15). Mr. Musk chose
24 to correct the record and fight back. He wrote four tweets:

25 In his first tweet, Mr. Musk responded to Mr. Unsworth’s false claims that he
26 was “asked to leave [the rescue site] very quickly” and that his participation was
27 driven by questionable motives: “Never saw this British expat guy who lives in
28 Thailand (sus) at any point when we were in the caves. Only people in sight were the

1 Thai navy/army guys, who were great. Thai navy seals escorted us in – total opposite
 2 of wanting us to leave.” (SUF 37; Musk Ex. F). By referring to Mr. Unsworth as
 3 “sus,” Mr. Musk sought to convey that Mr. Unsworth was “just a weird guy ...
 4 looking for press,” just as Mr. Unsworth had accused Mr. Musk of looking for
 5 publicity. (SUF 38; Musk Depo. 154:12-24; Musk Decl. ¶ 25). Significantly, Mr.
 6 Unsworth has admitted in deposition that there was nothing about him in Mr. Musk’s
 7 first tweet that was false. (SUF 39; Unsworth Depo. 260:6-15).

8 In the second tweet, Mr. Musk rebutted the claim that he “had no conception of
 9 what the cave passage looked like.” He described the conditions and that the “[w]ater
 10 level was actually very low & still (not flowing) – you could literally have swum to
 11 Cave 5 with no gear, which is obv how the kids got in. If not true, then I challenge
 12 this dude to show final rescue video.” (SUF 40; Musk Ex. G). Here again Mr.
 13 Unsworth has admitted that there was nothing about him in this tweet that was false.
 14 (SUF 41; Unsworth Depo. 263:5-264:9).

15 In the third tweet, Mr. Musk responded to Mr. Unsworth’s assertion that the
 16 submarine “had absolutely no chance of working” by tweeting that “[w]e will make
 17 [a video] of the mini-sub/pod going all the way to Cave 5 no problem.” He
 18 concluded by answering Mr. Unsworth’s colorful language about his motives with
 19 colorful language of his own, “[s]orry pedo guy, you really did ask for it.” (SUF 42;
 20 Musk Ex. H). Mr. Musk testified that “pedo guy” was a common insult used in South
 21 Africa during his youth. It is synonymous with “creepy old man” and aimed at
 22 mocking a person’s appearance and demeanor, not an accusation of pedophilia. (SUF
 23 43-44; Musk Depo. 51:21-52:17; Musk Decl. ¶ 28).

24 Finally, in response to a tweet taking issue with his language and use of the
 25 phrase “pedo guy,” Mr. Musk tweeted “bet ya a signed dollar its true.” (SUF 47;
 26 Musk Ex. I). He explained this as a “flippant comment,” meant to convey that he
 27 “was not certain” about the prior tweets (SUF 48; Musk Depo. 141:2-22, 140:16-25).

28 Within hours of their publication, Mr. Musk deleted all four tweets. (SUF 49).

1 **E. Mr. Musk Apologizes to Mr. Unsworth.**

2 On July 18, Mr. Musk apologized for using heated language in his debate with
3 Mr. Unsworth: “my words were spoken in anger after Mr. Unsworth said several
4 untruths & suggested I engage in a sexual act with the mini-sub, which had been built
5 as an act of kindness & according to specifications from the dive team leader.” (SUF
6 50; Musk Ex. J). He concluded that Mr. Unsworth’s “actions against me do not
7 justify my actions against him, and for that I apologize to Mr. Unsworth and to the
8 companies I represent as leader. The fault is mine and mine alone.” (*Id.*).

9 **F. Mr. Musk Retains an Investigator who Reports On Mr. Unsworth.**

10 On July 17, James Howard, a private investigator and head of the investigation
11 firm Jupiter Military & Tactical Systems, sent an unsolicited email to Mr. Musk and
12 offered to conduct an investigation of Mr. Unsworth. (Musk Ex. N). Mr. Howard
13 explained that “Mr. Unsworth has skeletons in his cupboard.” (*Id.*). The following
14 month, Mr. Musk, through the president of his home office, Jared Birchall, retained
15 Mr. Howard to investigate. (SUF 51; Birchall Decl. ¶ 4; Ex. A).

16 Mr. Howard sent Mr. Birchall a presentation on his firm’s capabilities and said
17 he had performed sensitive investigations for high profile clients, including Paul
18 Allen and George Soros. (SUF 52; Birchall Ex. A). Mr. Birchall made clear to Mr.
19 Howard that Mr. Musk was seeking the truth, and no more: “[W]e aren’t looking to
20 frame anyone. If there is definitively no smoking gun, then let’s get the information
21 necessary to make that determination and *it is what it is.*” (SUF 53; Birchall Ex. D).
22 Mr. Birchall ultimately paid Mr. Howard more than \$50,000 to perform the
23 investigation. (SUF 54; Birchall Decl. ¶ 8).

24 Days after he was retained, Mr. Howard reported troubling facts about Mr.
25 Unsworth. On August 17, Mr. Howard wrote to Mr. Birchall that “there is indeed an
26 unpleasant undertone to some of his lifestyle choices” and “[t]here is no question that
27 [he] ‘associates’ locally with Europeans who enjoy ‘Thai comforts’ that are not
28 acceptable in a developed society.” (SUF 55; Birchall Ex. C). Mr. Howard also

1 stated to Mr. Birchall in a phone call that there was evidence that Mr. Unsworth met
 2 and began a relationship with his alleged Thai wife when she was eleven or twelve
 3 years old. (SUF 56; Birchall Decl. ¶ 12). On August 27, Mr. Howard emailed Mr.
 4 Birchall that Mr. Unsworth, had frequently traveled to Thailand since the 1980s and
 5 that he was a “Manther”—an older man who prefers young women. (SUF 59;
 6 Birchall Ex. D).³ Mr. Birchall relayed this to Mr. Musk. (SUF 57, 60; Birchall Decl.
 7 ¶ 15; Musk Decl. ¶ 35).

8 **G. Mr. Musk’s August 28, 2018 Tweet and Lin Wood’s Tweet.**

9 On August 28, 2018, just days after Mr. Musk heard the investigator’s initial
 10 findings, Drew Olanoff, a reporter for TechCrunch, tweeted at Mr. Musk “your
 11 dedication to facts and truth would have been wonderful if applied to that time when
 12 you called someone a pedo.” (SUF 62; Musk Ex. K). In response, and with
 13 knowledge of Mr. Howard’s initial findings, Mr. Musk replied “[y]ou don’t think it’s
 14 strange he hasn’t sued me? He was offered free legal services.” (*Id.*).

15 Mr. Unsworth’s attorney, Lin Wood, then went on the attack himself, tweeting
 16 a response to Mr. Musk stating “@elonmusk should check his mail before tweeting”
 17 and attaching a copy of a demand letter. (SUF 70; Lifrak Ex. 22).

18 **H. The Investigator Reports More Detailed Findings to Birchall.**

19 In late August 2018, Mr. Howard provided Mr. Birchall with regular telephonic
 20 reports of his team’s findings. (SUF 64; Birchall Decl. ¶ 17). Mr. Howard told Mr.
 21 Birchall that he learned that Mr. Unsworth spent significant time in Pattaya Beach – a
 22 known hotspot for prostitution and sex tourism, Mr. Unsworth associated with other
 23 European expatriates with nefarious sexual proclivities, and that Mr. Unsworth was
 24 unpopular at the Thai Cave Rescue because others regarded him as “creepy.” (*Id.*).

25 _____
 26 ³ In the same email, Mr. Howard reported that Mr. Unsworth’s alleged Thai wife
 27 may have been 18 when they first met, but that this was “NOT verified.” (SUF 58;
 28 Birchall Ex. D). Subsequent to the email, Mr. Howard repeated the prior information
 that she was eleven or twelve, not eighteen. (SUF 61; Birchall Decl. ¶ 16).

1 Mr. Howard represented on these calls that he was confident in the information he
 2 was providing. (*Id.*). Mr. Birchall reported this information to Mr. Musk shortly
 3 after receiving it. (*Id.*).

4 On August 30, Mr. Howard sent Mr. Birchall a preliminary report of his
 5 investigation of Mr. Unsworth. The report was consistent with the prior information
 6 Mr. Howard provided to Mr. Birchall on calls and in emails, and stated the following:

7 • “Mr. Unsworth has been a frequent visitor to Thailand since the 1980s.
 8 Prior to meeting his current wife we believe that Mr. Unsworth was living in the
 9 Pattaya Beach...Pattaya Beach is synonymous with prostitution and scam artists.”

10 • “The sexpat whore-mongers his way through the go-go bars of Thailand.
 11 His only other friends are his sexpat peers. Peek-density occurs in and around
 12 Pattaya – Thailand’s sin city.”

13 • “[S]ome of the UK and Dutch divers who also volunteered stated that
 14 Mr. Unsworth was not a popular or particularly liked man in the Cave Rescue Team.
 15 When pushed as to why, they simply replied ‘Creepy.’”
 16 (SUF 66-67; Birchall Ex. E).

17 **I. Mr. Musk’s “Off-the-Record” Emails to BuzzFeed**

18 On August 29, 2018, Ryan Mac, a reporter with BuzzFeed News, emailed Mr.
 19 Musk about the demand letter Mr. Unsworth’s counsel had sent to Mr. Musk. (SUF
 20 71). On August 30, Mr. Mac sent a follow up. (SUF 72; Musk Ex. L).

21 Mr. Musk sent two emails in response. (SUF 73). In the first, he relayed the
 22 investigator’s findings as they were represented to him and implored Mr. Mac to “call
 23 people you know in Thailand, find out what’s actually going on.” (SUF 77; Musk
 24 Ex. L). He wrote that Mr. Unsworth had been “traveling to or living in Thailand for
 25 30 to 40 years, mostly Pattaya Beach, until moving to Chiang Rai for a child bride
 26 that was about 12 years old at the time,” which is what Mr. Birchall had told him the
 27 investigator had reported. (SUF 80-81; Musk Decl. ¶ 45). Based on this, Mr. Musk
 28 referred to Mr. Unsworth as a “child rapist[.]” (SUF 79; Musk Depo. 176:4-24). He

1 wrote that “there’s only one reason people go to Pattaya Beach. It isn’t where you go
2 for caves, but it is where you’d go for something else,” which was also consistent
3 with the investigator’s reports to Mr. Birchall. (SUF 82-83; Musk Decl. ¶ 46; Musk
4 Depo. 62:8-64:15). It stated that “Chiang Rai is renowned for child sex-trafficking,”
5 which was supported by a Google search Mr. Musk provided in the email. (SUF 84-
6 85; Musk Ex. L). He wrote, as had been reported to him, that “most of the actual dive
7 team refused to hang out with [Mr. Unsworth.]” (SUF 86-87; Musk Decl. ¶ 48).

8 Mr. Musk told BuzzFeed that it could not publish his email. And he did not
9 intend for it to become public without independent verification. (SUF 74-75; Musk
10 Depo. at 173:23-175:11; Musk Decl. ¶ 43). To those ends, Mr. Musk conspicuously
11 wrote “Off the record” at the start of the email. (SUF 74; Musk Decl. L).

12 In his second email, which he designated “On background,” Mr. Musk
13 responded to Mr. Unsworth’s claims that he was asked to leave the rescue site, that
14 the submarine would not fit, and that his involvement was “just a PR stunt.” (SUF
15 89-90; Musk Ex. M).

16 Five days later, on September 4, Mr. Mac responded and said he intended to
17 publish the emails because “he didn’t agree for the conversation to be off the record.”
18 (SUF 94-95; Musk Ex. L). Mr. Musk responded that “We haven’t had a conversation
19 at all. I sent you an off the record email, which very clearly and unambiguously said,
20 ‘off the record.’ If you want to publish off the record comments and destroy your
21 journalistic credibility, that’s up to you. As for answering more questions, I would be
22 happy to do so, but not with someone who just told me that they will not honor
23 accepted rules of journalism.” (SUF 96; Musk Decl. Ex. L).

24 That evening, BuzzFeed published a story that reprinted Mr. Musk’s off-the-
25 record and on-background emails. (SUF 103; Ex. K to Compl.).

26 **J. Mr. Unsworth Sues.**

27 Mr. Unsworth filed his Complaint on September 17, 2018, stating a sole claim
28 for defamation. (Doc. No. 1). The Complaint lists the following as Mr. Musk’s

1 “false and defamatory accusations”: “Exhibits B [first July 15 tweet], C [second July
2 15 tweet], D [third July 15 tweet], E [fourth July 15 tweet], F [July 18 apology tweet],
3 G [July 18 apology tweet], I [July 28 tweet], and K [BuzzFeed September 4 article].”
4 (SUF 106; Compl. ¶ 113). Mr. Unsworth has also filed a claim against Mr. Musk in
5 England. For the Court’s convenience, Appendix A contains a timeline of key events
6 after Mr. Unsworth’s CNN interview.

7 **LEGAL DISCUSSION**

8 **I. MR. UNSWORTH IS A LIMITED PURPOSE PUBLIC FIGURE.**

9 As an initial matter, the Court must determine for purposes of the liability
10 standard whether or not Mr. Unsworth is a public figure. Under the law, he is. He
11 made himself an active participant in one of the biggest news stories of 2018. He
12 regularly gave interviews to the media. He injected himself into a public controversy
13 by debating—on worldwide TV—the rescue, Mr. Musk’s motives for participating,
14 and the need and value of Mr. Musk’s efforts. He is thus a “limited purpose” public
15 figure and must prove that Mr. Musk’s statements were made with actual malice.

16 **A. The Constitutional Framework**

17 To protect public debate and guard against the chilling effect of litigation, the
18 First Amendment requires that public figures prove a statement is made with “actual
19 malice.” *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280(1964); *see also*
20 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974). Claims brought by “limited
21 purpose” or “vortex” public figures—persons like Mr. Unsworth who inject
22 themselves into a public controversy and “become[] public figure[s] for a limited
23 range of issues” related to that controversy—are also subject to the “actual malice”
24 standard. *Gertz*, 418 U.S. at 351. They are less deserving of protection because, by
25 injecting themselves into a public controversy, they have “voluntarily exposed
26 themselves to increased risk of injury from defamatory falsehood concerning them.”
27 *Id.* at 345. They also have “considerably greater access than private individuals to the
28 media” with which they engage in self-help to protect their reputations and are thus

1 “less vulnerable” to defamation injury. *Reader’s Digest Assn. v. Superior Court*, 37
2 Cal. 3d 244, 253 (1984) (citing *Gertz*, 418 U.S. at 344-45).

3 A plaintiff is a limited purpose public figure and subject to the actual malice
4 standard where, as here: (1) there is a public controversy; (2) the plaintiff voluntarily
5 injects himself into and/or seeks to influence the resolution of the public controversy;
6 and (3) the alleged defamatory statement is “germane” to the plaintiff’s participation
7 in the controversy. *See Copp v. Paxton*, 45 Cal. App. 4th 829, 846 (1996).

8 Determining whether a plaintiff is a limited purpose public figure requires an analysis
9 of the totality of the circumstances of the controversy and is question of law that must
10 be resolved by the Court. *See Reader’s Digest*, 37 Cal. 3d at 255; *see also Khawar v.*
11 *Globe Int’l, Inc.*, 19 Cal. 4th 254, 264 (1998).

12 **B. Numerous Public Controversies Arose in 2018 Over the Rescue.**

13 A public controversy is a dispute that is “debated publicly” and has
14 “foreseeable and substantial ramifications for nonparticipants” to the debate. *Annette*
15 *F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1164 (2004) (citing *Waldbaum v. Fairchild*
16 *Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980)); *see also Makaeff v. Trump*
17 *Univ., LLC*, 715 F.3d 254, 267 (9th Cir. 2013) (“a public controversy ‘must be a real
18 dispute, the outcome of which affects the general public or some segment of it.’”) (citing *Waldbaum*, 627 F.2d at 1297). To determine whether one exists, courts
19 consider “if the press was covering the debate, reporting what people were saying and
20 uncovering facts and theories to help the public formulate some judgment,” and
21 should not “question the legitimacy of the public’s controversy” or substitute its
22 judgment of newsworthiness, but instead “look to what already were disputes.”
23 *Waldbaum*, 627 F.2d at 1297.

24 In Summer 2018, aspects of the cave rescue were under fierce public debate
25 and worldwide media coverage. Individuals, including Mr. Unsworth, debated where
26 the boys were likely located, how to rescue them, and how to rescue boys who were
27 weak or could not swim. (SUF 6-10; Lifrak Decl. Exs. 3-6, 20). There was also
28

1 debate about the viability of Mr. Musk's submarine, including a public Twitter
 2 discussion between him and the Thai Provincial Governor. (SUF 28-30; Lifrak Exs.
 3 14-20; Musk Ex. E). The BBC, *New York Times*, and other international outlets also
 4 reported this debate and interviewed experts about the submarine's viability. (SUF
 5 21-27; Lifrak Exs. 14-19). The *New York Times* alone published three articles about
 6 the debate before Mr. Unsworth's CNN interview. (SUF 22-23, 27; Lifrak Exs. 14,
 7 15, 19). Mr. Unsworth was aware of the controversy and watched a video of the
 8 submarine before his CNN interview. (SUF 32; Unsworth Depo. 214:17-218:10).⁴

9 **C. Mr. Unsworth Voluntarily Injected Himself Into the Controversies.**

10 A person becomes a limited purpose public figure when he "undertake[s] some
 11 voluntary act through which he seeks to influence the resolution of the public issues
 12 involved." *Reader's Digest*, 37 Cal. 3d at 254. Courts must "look for evidence of
 13 affirmative actions" by which the plaintiff may have "thrust themselves into the
 14 forefront of particular public controversies." *Id.* at 255.

15 Before he spoke with CNN (and before Mr. Musk posted the July tweets), Mr.
 16 Unsworth "voluntarily thrust himself into the limelight" by giving interviews and
 17 presenting himself as a key rescue participant. (SUF 7-10; Lifrak Exs. 3-6). *Denney*
 18 *v. Lawrence*, 22 Cal. App. 4th 927, 935-36 (1994) (holding plaintiff limited purpose
 19 public figure because he volunteered to give media interviews promoting his version
 20 of events); *Rudnick v. McMillan*, 25 Cal. App. 4th 1183, 1190 (1994) (plaintiff
 21 became a limited purpose public figure by inviting the press to write about him).

22 After obtaining fame and credibility from *his* claimed role in the rescue, Mr.
 23

24 ⁴ As a public figure who heads several businesses (including Tesla, a public
 25 company), a debate over Mr. Musk's motives and whether his participation was a
 26 "PR stunt" to boost his companies had ramifications beyond himself. *See Ampex*
 27 *Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1577-78 (2005) (debate over publicly traded
 28 company had foreseeable and substantial ramifications for nonparticipant
 shareholders); *Annette F.*, 119 Cal. App. 4th at 1164; *Makaeff*, 715 F.3d at 267.
 Whether the submarine could assist in future rescues also went beyond Mr. Musk.
See Copp, 45 Cal. App. 4th at 846 (debate over future earthquake disaster mitigation
 had foreseeable and substantial ramifications for nonparticipants).

Unsworth thrust himself into the public debate over **Mr. Musk's** role by giving a televised interview in which he opined about the viability of the submarine and stated that Mr. Musk's efforts were "just a PR stunt." (SUF 34; Lifrak Ex. 21). Like the plaintiff in *Denney*, Mr. Unsworth took "advantage of his own position" and "expertise" as a prominent member of the rescue team to "influence public opinion" about Mr. Musk in a voluntary interview with the media. 22 Cal. App. 4th at 935-36. Through his actions, he became a limited purpose public figure in the debate over the rescue generally, as well as over Mr. Musk's role specifically. *See id.*; *see also Nadel v. Regents of Univ. of California*, 28 Cal. App. 4th 1251, 1269 (1994) (plaintiff who gave interviews to the press about a public controversy was a limited public figure).

Moreover, Mr. Unsworth has cashed in on his fame to participate in films, speaking engagements, BBC Podcasts, and books. *GQ Magazine* even profiled him in its "Men of the Year 2018" edition, and he accepted the Most Excellent Order of the British Empire from the Queen of England. (SUF 13, 20; Lifrak Exs. 9, 13); *see Thomas v. Los Angeles Times Comm., LLC*, 189 F. Supp. 2d 1005, 1012 (C.D. Cal. 2002) (plaintiff's cooperation in book about his life "invited public attention—and public scrutiny—to his life" and rendered him a limited purpose public figure).⁵

D. Mr. Musk's Statements Were Germane to the Controversy.

A statement made in discussing a public controversy is germane unless it is "wholly unrelated" to that controversy. *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016) (citing *Waldbaum*, 627 F.2d at 1298). Mr. Musk's statements about Mr. Unsworth were not.

First, they were the mirror image of Mr. Unsworth's statements about Mr. Musk's motives, on the very same public issues. Mr. Unsworth claimed that Mr.

⁵ Mr. Unsworth's relationship with the press and actions after his CNN interview reinforce that he is a limited purpose public figure. During and after the rescue he spoke with and had relationships with reporters from major media outlets, including ABC and *The Sunday Times*. (SUF 18). His access to and close relationship with the press renders him "less vulnerable to defamation injury" and weighs in favor of a finding that he is a limited purpose public figure. *See Gertz*, 418 U.S. at 344-45.

1 Musk’s submarine would not work (thus, putting the children in danger if used) and
 2 that Mr. Musk’s motives were self-interested (PR, and not a genuine effort to help
 3 children). (SUF 34; Lifrak Ex. 21). If Mr. Unsworth were a pedophile, it would bear
 4 on *his* motives for participating in the rescue, whether *his* presence was necessary
 5 after the boys had been located, given his lack of diving qualifications, and why *he*
 6 was denigrating someone else’s motives and efforts. *Jankovic*, 822 F.3d at 589
 7 (holding statement germane when it related “to understanding [plaintiff’s] role and
 8 why he wanted to be involved in the [controversy]”).⁶

9 Second, having entered the public fray on these issues, Mr. Unsworth cannot
 10 escape scrutiny of *his* credibility, character, and motivations. By definition, his
 11 credibility, character, and motivations are germane to the public controversies into
 12 which he inserted himself. And scrutinizing Mr. Unsworth’s credibility, character,
 13 and motivations is exactly what Mr. Musk was entitled to do. *See Waldbaum*, 627
 14 F.2d at 1298 (affirming summary judgment and holding that plaintiff’s “talents,
 15 education, experience, and motives” are germane to controversy because it “could
 16 have been relevant to the public’s decision whether to listen to him”); *Atlanta*
 17 *Journal-Constitution v. Jewell*, 555 S.E.2d 175, 183 (Ga. App. 2001) (in lawsuit
 18 brought by accused 1996 Olympics bomber, alleged defamatory statements that he
 19 had “an aberrant personality” and “a bizarre employment history,” were germane to
 20 controversies over the bombing).

21 Third, Mr. Musk’s statements related directly to the public controversy
 22 regarding the parties’ rescue efforts. One of Mr. Musk’s emails to BuzzFeed refuted
 23 Mr. Unsworth’s accusation that the Thai government had asked Mr. Musk to leave
 24 the caves, that it “should have” done so, and that the submarine would not have been
 25

26 ⁶ Mr. Unsworth understood that Mr. Musk was questioning his motives, saying in a
 27 media interview shortly after the first tweets that “you know, rescuing 12 young boys,
 28 by definition, that puts everyone else in the same context.” (Lifrak Decl. ¶ 30). And
 whether statements were true or false is not relevant to whether they were germane to
 Mr. Unsworth’s role in the controversy. *See Jankovic*, 822 F.3d at 589.

able to assist in the rescue. (SUF 90-91; Musk Ex. M). The other related to Mr. Unsworth's motives for participating in the rescue and seeking continued media attention and proximity to the rescued children. (SUF 77-87; Musk Ex. L). The same is true for the tweets describing Mr. Unsworth as "sus" and "pedo guy." (SUF 37-42; Musk Decl. Ex. F-H). For these reasons, the statements are far from being "wholly unrelated" to the public controversies. *Jankovic*, 822 F.3d at 589.

Read in their totality, as the limited purpose public figure analysis requires, Mr. Musk's statements were relevant and germane to the ongoing debates about the cave rescue, the legitimacy of efforts made to assist in the rescue, and the motivations for such assistance. And they were aimed at a public figure engaged in the same debate. These statements thus must be analyzed under the actual malice standard. *See Reader's Digest*, 37 Cal. 3d at 256.⁷

II. THE BUZZFEED ARTICLE IS NOT DEFAMATION BY MR. MUSK.

A. Plaintiff Must Prove Actual Malice.

Under *New York Times* and its progeny, public figure plaintiffs must establish by clear and convincing evidence that the defamatory statement was made with "actual malice." *New York Times*, 376 U.S. at 280; *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 84 (2007). "The burden of proof by clear and convincing evidence 'requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.'" *Copp*, 45 Cal. App. 4th at 846 (citation omitted). The burden applies to summary judgment. The Court must find that "no triable issues" exist and grant this motion "unless it appears that actual malice may be proved at trial by clear and convincing evidence." *Reader's Digest*, 37 Cal. 3d. at 252; *D.A.R.E. Am. v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270,

⁷ Mr. Unsworth's lawyer has publicly conceded as much: "The current laws could make Mr. Unsworth's case against Musk tougher, Wood said, because he gave media interviews criticizing Musk's proposal for using a miniature submarine for the cave rescue, and thus might be considered a public figure." (Lifrak Ex. 8).

1 1278 (C.D. Cal. 2000), *aff'd*, 270 F.3d 793 (9th Cir. 2001) (same). Summary
 2 judgment is a “favored remedy” in defamation cases. *See Reader’s Digest*, 37 Cal.
 3 3d. 244 at 252.

4 **B. Mr. Unsworth Cannot Prove Malice Because Mr. Musk Did Not**
 5 **Entertain Serious Doubts as to The Accuracy of His Statements.**

6 Mr. Musk paid a significant sum to hire an investigator and was told by a
 7 trusted aide that the investigator learned that Mr. Unsworth engaged in illegal
 8 activities. He passed that information to BuzzFeed in an off-the-record email so that
 9 it could conduct its own investigation. (SUF 76-77; Musk Decl. ¶ 43; Musk Depo.
 10 173:23-175:11). That is not malice.

11 **1. The Applicable Standard**

12 To establish that the off-the-record BuzzFeed emails were written with actual
 13 malice, Mr. Unsworth must prove by clear and convincing evidence that Mr. Musk
 14 made the statements “with knowledge that [they were] false or with reckless
 15 disregard of whether [they were] false or not.” *New York Times*, 376 U.S. at 279-80.
 16 This test is *subjective*. *See e.g., Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). It is
 17 irrelevant whether a reasonable person would believe that the statements were false or
 18 entertain serious doubts as to their truth. Establishing actual malice requires
 19 “sufficient evidence to permit the conclusion that the *defendant in fact* entertained
 20 serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S.
 21 727, 731-32 (1968) (emphasis added). Only “false statements made with the high
 22 degree of awareness of their probable falsity” can give rise to liability under the
 23 actual malice test. *Garrison*, 379 U.S. at 74. There is no such evidence here.

24 **2. Musk’s Email Was Based On Investigator’s Findings.**

25 There can be no finding of actual malice because Mr. Musk reported to
 26 BuzzFeed only information that he understood had been uncovered by a private
 27 investigator. *See e.g., Reader’s Digest*, 37 Cal. 3d. at 259 (finding no actual malice
 28 where defendant published information obtained from a third party source); *Christian*

1 *Research*, 148 Cal. App. 4th at 91 (no actual malice where information was
 2 purportedly obtained from an effectively anonymous source in the postal inspector's
 3 office). Mr. Musk's close aide, Mr. Birchall, relayed the investigator's findings to
 4 him. (SUF 60, 66; Birchall Decl. ¶¶ 14-17, 19; Musk Decl. ¶ 35). Each of the
 5 allegedly defamatory statements Mr. Musk made to BuzzFeed was supported by the
 6 investigator's findings, Mr. Birchall's oral reports, or statements from one of Mr.
 7 Musk's employees present at the rescue. (See SUF 81-87, 90-91; *Compare* Musk Ex.
 8 L with Birchall Decl. ¶¶ 15-19; Musk Decl. ¶¶ 44-51).

9 **3. Mr. Unsworth Cannot Prove Malice.**

10 There is no evidence that Mr. Musk knew the information was false or
 11 "entertained serious doubts as to the truth of his publication" before he wrote to
 12 BuzzFeed. *St. Amant*, 390 U.S. at 731. Messrs. Musk and Birchall both believed the
 13 investigator to be credible; he represented to Mr. Birchall that he had performed
 14 investigations for high profile and respected individuals. (SUF 52; Birchall Ex. A);
 15 see *D.A.R.E. Am.*, 101 F. Supp. 2d at 1281 (no actual malice where publisher believed
 16 source to be credible in light of his prior affiliation with a respected news
 17 organization). Mr. Musk, through Mr. Birchall, paid the investigator over \$50,000
 18 for his work, which further evidences their belief that the investigation was credible.
 19 (SUF 54; Birchall Decl. ¶ 8). And at the outset, Mr. Birchall told the investigator that
 20 they were not "looking to frame anyone," and instructed him to provide exculpatory
 21 information if "there is definitively no smoking gun." (SUF 53; Birchall Ex. D).

22 California courts have found no actual malice where defendants relied on far
 23 less credible sources, such as imprisoned felons who made "superficially outlandish
 24 claims" in their interactions with defendants, *McCoy v. Hearst Corp.*, 42 Cal. 3d 835,
 25 867-68 (1986), or accusations that a plaintiff was under investigation for mail fraud
 26 based on speaking with an employee of the postal inspector's office named
 27 "Debra"—no title or last name was given. *Christian Research*, 148 Cal. App. 4th at
 28 91. Even though that information was false, the court found an absence of malice,

1 holding that the “mere fact that [Defendant] could have done more to investigate the
 2 reliability of his informants is not indicative of malice,” and that there was “nothing
 3 in the record to indicate that [Defendant] was suspicious of her veracity or doubted
 4 her knowledge of the investigation.” *Id.* So too here.

5 Unlike the defendant in *Christian Research*, Mr. Musk sought further inquiry
 6 and corroboration of the findings. To rise to actual malice, the “failure to investigate
 7 must fairly be characterized as ‘the purposeful avoidance of the truth’ or the ‘product
 8 of a deliberate decision not to acquire knowledge of facts that might confirm the
 9 probable falsity of [the subject] charges.’” *Rosenauro v. Scherer*, 88 Cal. App. 4th
 10 260, 277 (2001) (citation omitted). Here, Mr. Musk did not purposely avoid the truth,
 11 he asked a media organization to **confirm it**. (SUF 77; Musk Ex. L (“I suggest that
 12 you call people you know in Thailand, find out what’s actually going on.”)).

13 It would make no difference even if Mr. Musk was not certain of the accuracy
 14 of the investigator’s claims or did not investigate the investigator. *See Jackson v.*
 15 *Paramount Pictures Corp.*, 68 Cal. App. 4th 10, 35–36 (1998) (“The *New York Times*
 16 *Co. v. Sullivan* standard does not require that the reporter hold a devout belief in the
 17 truth of the story being reported, only that he or she refrain from either reporting a
 18 story he or she knows to be false or acting in reckless disregard of the truth.”).

19 Mr. Musk’s testimony shows that he did not know that the information he
 20 relayed to BuzzFeed off the record was false. Nor did he entertain serious doubts as
 21 to its truth. *See e.g., Christian Research*, 148 Cal. App. 4th at 85; *Overstock.com,*
 22 *Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 710 (2007). Because Mr.
 23 Unsworth has no contrary evidence, a fortiori, he cannot prove actual malice. Thus,
 24 his claims that the off-the-record emails to BuzzFeed are defamatory cannot proceed
 25 beyond the summary judgment stage. *See Reader’s Digest*, 37 Cal. 3d. at 252.

1 **C. Mr. Musk Is Not Liable for Publication of Off-the-Record Emails.**

2 **1. The Applicable Standard**

3 Mr. Musk is liable for BuzzFeed’s republication of his emails⁸ only if
 4 BuzzFeed’s actions were reasonably foreseeable. *Shively v. Bozanich*, 31 Cal. 4th
 5 1230, 1243 (2003) (“repetition by a new party of another person’s earlier defamatory
 6 remark also gives rise to a separate cause of action for defamation against the original
 7 defamer, when the repetition was reasonably foreseeable”); *DiGiorgio Corp. v.*
 8 *Valley Labor Citizen*, 260 Cal. App. 2d 268, 273 (1968) (author of article not liable
 9 for republication in another newspaper because not reasonably foreseeable); *Curley v.*
 10 *Vick*, 211 Cal. App. 2d 670, 672–73 (1963) (author of letter posted on bulletin board
 11 not liable for posting unless republication *on the bulletin board* was reasonably
 12 foreseeable); *see also Chandler v. Berlin*, 2019 WL 1471336, at * 4 (D.D.C., Apr. 3,
 13 2019) (republication of document not reasonably foreseeable because document was
 14 sent “privately” and marked as “confidential.”).

15 **2. Republication Was Not Reasonably Foreseeable.**

16 It was not reasonably foreseeable that BuzzFeed would unilaterally publish
 17 communications that were labeled off-the-record instead of independently verifying
 18 the information before publishing it. BuzzFeed’s own published policies require such
 19 verification. (SUF 102; Lifrak Decl. Ex. 25). (“Information — excluding common
 20 knowledge — should come from a verified source.”).⁹ That is what Mr. Musk
 21 reasonably expected BuzzFeed to do. (SUF 76; Musk Decl. ¶ 43; Musk Depo.
 22 173:23-175:11); *Chandler*, 2019 WL 1471336, at * 4 (“confidential” designation on
 23 document sufficient to prove “reasonable assurance [that it] would go no further”
 24 (citing Restatement of Second of Torts § 576 (1977)). And that is what BuzzFeed

25 _____
 26 ⁸ Plaintiff’s defamation claim is based on the publication of the emails in a
 BuzzFeed article, not on the emails to BuzzFeed standing alone. *See* Compl. ¶ 113.

27 ⁹ BuzzFeed’s own newsroom policies in place at the time required no “agreement”
 28 to go off the record. (SUF 100; Lifrak Ex. 24). BuzzFeed added this requirement
 two months *after* Mr. Musk sent the off-the-record emails. (SUF101; Lifrak Ex. 25).

1 should have done.¹⁰

2 Moreover, Mr. Unsworth testified that he too had previously designated his
3 communications with reporters as “off the record” or imposed similar limits, and
4 expected that the information conveyed would not be made public even without first
5 reaching a formal agreement with the reporter. (SUF 99; Unsworth Depo. 78:13-
6 79:19; Lifrak Ex. 23). Mr. Musk explained that BuzzFeed’s post-email insistence
7 that he had to obtain a positive confirmation from a reporter, before a communication
8 will be deemed off the record, was inconsistent with his countless off-the-record
9 interactions with reporters in the past. (SUF 97; Musk Depo. 171:2-172:16).

10 **D. Mr. Musk’s August 28 Tweet Lacked Actual Malice.**

11 Similarly, Mr. Unsworth cannot establish that Mr. Musk’s August 28, 2018
12 tweet was written with actual malice. *See e.g., Reader’s Digest*, 37 Cal. 3d. at 252
13 (finding no actual malice where defendant published information obtained from a
14 third party source). Mr. Musk tweeted, in response to a tweet regarding Mr.
15 Unsworth, that “You don’t think it’s strange he hasn’t sued me? He was offered free
16 legal services.” (SUF 62; Musk Ex. K). He testified that he “meant those words
17 literally. That’s strange. That does not mean that he was a pedophile; just means
18 perhaps he has something to hide.” (Musk Depo. 196:20-25).

19 Mr. Musk had good reason to believe that. His tweet and suspicions were
20 supported by the information he received from the investigation. By August 28, the
21 investigator had reported that Mr. Unsworth had married a teenager, frequently
22 visited Thailand since the 1980s, and was known to prefer the company of young
23 women. (SUF 63; Birchall Ex. D; Birchall Decl. ¶ 15; Musk Decl. ¶ 39). Because
24 Mr. Musk based this tweet on information concerning which he did not have serious

25 ¹⁰ BuzzFeed’s failure to verify the assertions about Mr. Unsworth break any causal
26 chain between Mr. Musk and the BuzzFeed article. *See Live Oak Publ’g Co. v.*
27 *Cohagan*, 234 Cal. App. 3d 1277, 1285 (1991) (“The rationale for making the
28 originator of a defamatory statement liable for its foreseeable republication is the
strong causal link between the actions of the originator and the damage caused by
the republication.”) (emphasis added).

doubts, Mr. Unsworth cannot establish it was written with actual malice. (SUF 63; Musk Decl. ¶ 39); *see Christian Research*, 148 Cal. App. 4th at 91; *infra* Section II.

III. MR. MUSK'S INITIAL TWEETS ARE NOT DEFAMATION.

A. Mr. Unsworth Must Prove That Mr. Musk Knew or Believed Readers Would View His Statements as Objective Facts.

In the Court's Order on Mr. Musk's motion to dismiss, it held that a jury would decide whether Mr. Musk's statements about Mr. Unsworth were statements of opinions or implied assertions of objective fact. (Dkt. 42, at 13). But as discussed above, Mr. Unsworth must *also* prove by clear and convincing evidence that Mr. Musk's alleged defamatory statements were made with actual malice. As to the July 15, 2018 tweets, he cannot do so.

In a situation where, as the Court found, the statements "could be construed as *either* fact or opinion," (Dkt. 42, at 13 fn. 9), *Good Gov't Grp. of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672, 684 (1978), applies. There, the California Supreme Court found that in situations where a statement is "ambiguous in the sense that it can reasonably be viewed as either fact or opinion" but that the speaker "neither intends the statement to bear a factual meaning nor believes that it will be understood by the reader in that fashion," it would chill speech if the speaker could be found liable for defamation. *Id.*

The Court noted that such a standard would "hobbl[e] free speech" through the "fear of liability for the use of inexact semantics." *Id.* To protect free speech, "a statement is entitled to constitutional protection if the words used are ambiguous but the defendant honestly and without recklessness believes that they constitute an opinion or idea." *Id.* Thus, where the statements "could be construed as *either* fact or opinion," Dkt. 42, at 13 fn. 9, the plaintiff must prove "not only that the words were reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless

disregard of whether his words would be interpreted by the average reader as defamatory statements of fact.” 22 Cal. 3d 672 at 684. This is a *subjective* standard. *Id.*; see also *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 870 (2018) (“because actual malice is a ‘deliberately subjective’ test, liability cannot be imposed for an implication that merely ‘should have been foreseen.’”).

Thus, to prevail on his claim that the July 18 tweets are defamatory, Mr. Unsworth must prove by clear and convincing evidence that Mr. Musk knew or believed that his words would be interpreted as statements of fact. See *Good Gov’t.*, 22 Cal. 3d at 684; see also *Gordon & Holmes v. Love*, 2016 WL 374950, at *5 (Feb. 1, 2016) (actual malice cannot be satisfied “based on the dictionary definition” of a word and applying *Good Gov’t.*).

B. Mr. Unsworth Cannot Meet This High Burden.

Here, there is no evidence that Mr. Musk intended or believed that his July 15 tweets, that Mr. Unsworth was “sus” or “pedo guy,” would be interpreted as fact. To the contrary, the evidence is that Mr. Musk believed and intended his statements to be read as what they were: bare insults.

Mr. Musk’s deposition makes that clear. He intended his statements about Mr. Unsworth to be schoolyard taunts and not representations of fact. By referring to Mr. Unsworth as “sus,” he did not intend to convey any specific facts capable of being proven true or false, but that Mr. Unsworth was “just a weird guy” or some “creepy-ass expat looking for press.” (SUF 38; Musk Decl. ¶ 25; Musk Depo. at 154:12-24); see *Bauman v. Butowsky*, 377 F. Supp. 3d 1, 11 (D.D.C. 2019) (comment that a person’s action was “suspicious” was a nonactionable opinion). There is no evidence that Mr. Musk deliberately intended to couch this insult as a statement of fact or entertained serious doubt that it would be so interpreted.

Nor is there any evidence that Mr. Musk intended to suggest or convey any facts by tweeting “[s]orry pedo guy, you really did ask for it.” Read in context, Mr. Musk’s tweet was a response to Mr. Unsworth’s charge that the mini-submarine

1 would not work punctuated by a dismissive and (attempted) humorous insult. (SUF
 2 42; Musk Ex. H). As Mr. Musk testified, “pedo guy” was a common insult hurled
 3 around in his childhood. (SUF 42-44; Musk Depo. 51:21-52:17; *see also* Musk Decl.
 4 ¶¶ 28-29). The insult, as Mr. Musk understood and used it, is not meant to accuse a
 5 person of pedophilia but rather insults a person’s appearance as “[a]ny old creepy guy
 6 would be referred to [as] pedo guy.” (Musk Depo. 51:21-52:17.) As Mr. Musk
 7 testified, he did not frame his statement to imply that Mr. Unsworth was a pedophile,
 8 but that Mr. Unsworth “seem[ed] like a creepy old man.” (*Id.*; *see also* Musk Depo.
 9 at 198:3-10 (“The pedo guy was certainly not intended to be any kind of accusation
 10 of pedophilia. It was simply an insult.”)).

11 In fact, in Musk’s mind, even calling Mr. Unsworth a pedophile (which he did
 12 not do) could not imply an assertion of objective fact because, and as the Complaint
 13 also alleges, its definition includes thoughts without action, the existence of which are
 14 incapable of being proven true or false. (SUF 46; Compl. 1, ¶ 78). Thus, in his mind,
 15 it was impossible for anyone to view his statements as ones of fact.

16 Finally, there is no evidence, let alone clear and convincing evidence, that Mr.
 17 Musk’s tweet, “betcha a signed dollar it is true” was intended to suggest that his prior
 18 statements were factual. The tweet was a “flippant comment” that proposed a low
 19 stakes bet of a single dollar. (SUF 47-48; Musk Ex. I; Musk Depo. 141:2-22, 140:16-
 20 25). By proposing such an insubstantial wager, Mr. Musk was not taking a strong
 21 position as to whether his statements were true, or even capable of being proven true,
 22 but meant to convey that “obviously I’m not certain about this” and that he merely
 23 found Mr. Unsworth “suspicious.” (*Id.*). There is no testimony or evidence showing
 24 that it was Mr. Musk’s subjective intent for his readers to interpret his “becha” tweet
 25 as fact. *See Good Gov’t*, 22 Cal. 3d at 684.¹¹

26
 27
 28 ¹¹ Although not relevant to Mr. Musk’s subjective state of mind, the evidence shows that readers did not interpret the tweets to be true statements of fact because Mr.

Appendix A: Timeline of Key Events after Unsworth Interview

<u>Date</u>	<u>Event</u>
7/13/18	<p>Mr. Unsworth states in CNN interview that “[Mr. Musk] can stick his submarine where it hurts. It just had absolutely no chance of working. He had no conception of what the cave passage was like. The submarine, I believe, was about 5 foot 6 long, rigid, so it wouldn’t have gone round corners or round any obstacles. It wouldn’t have made the first fifty meters into the cave from the dive start point. Just a PR stunt.”</p> <p>“[Mr. Musk] was asked to leave [the rescue site] very quickly.”</p> <p>(SUF 33, Lifrak Decl. Ex. 21).</p>
7/15/18	<p>In response to Mr. Unsworth’s CNN interview, Mr. Musk tweets:</p> <ul style="list-style-type: none"> • “Never saw this British expat guy who lives in Thailand (sus) at any point when we were in the caves. Only people in sight were the Thai navy/army guys, who were great. Thai navy seals escorted us in – total opposite of wanting us to leave.” • “Water level was actually very low & still (not flowing) – you could literally have swum to Cave 5 with no gear, which is obv how the kids got in. If not true, then I challenge this dude to show final rescue video. Huge credit to pump & generator team. Unsung heroes here.” • “You know what, don’t bother showing the video. We will make one of the mini-sub/pod going all the way to Cave 5 no problem. Sorry pedo guy, you really did ask for it.” • “Bet ya a signed dollar its true.” <p>Within hours, Mr. Musk deletes the tweets.</p> <p>(SUF 34-48; Musk Exs. F-1; Musk Decl. ¶¶ 24-32).</p>
7/18/18	<p>Mr. Musk tweets apology:</p> <ul style="list-style-type: none"> • “As this well-written article suggests, my words were spoken in anger after Mr. Unsworth said several untruths & suggested I engage in a sexual act with the mini-sub, which had been built as an act of kindness & according to specifications from the dive team leader.” • “Nonetheless, his actions against me do not justify my actions against him, and for that I apologize to Mr. Unsworth and to the

<u>Date</u>	<u>Event</u>
	companies I represent as leader. The fault is mine and mine alone.” (SUF 49, Musk Ex. J).
8/15/18	Mr. Musk, through Mr. Birchall, retains Mr. Howard of Jupiter Military & Tactical Systems to conduct an investigation of Mr. Unsworth. (SUF 50, Birchall Decl. ¶ 4, Birchall Ex. A).
8/17/18	Investigator reports to Mr. Birchall that “there is indeed an unpleasant undertone to some of his lifestyle choices” and that Mr. Unsworth “associates locally with Europeans who enjoy ‘Thai comforts’ that are not acceptable in a developed society.” Mr. Birchall relays information to Mr. Musk. (SUF 54, 57; Birchall Decl. ¶ 14; Birchall Ex. D).
before 8/27/18	On telephone calls with Mr. Birchall, Mr. Howard describes a Thai news article that quoted Mr. Unsworth’s Thai wife and reported that Mr. Unsworth married his wife when she was 18 or 19 years old, but that they met and their relationship began seven years earlier, which would imply that she was eleven or twelve years old at the time. Mr. Birchall relays this information to Mr. Musk. (SUF 56; Birchall Decl. ¶ 12; Musk Decl. ¶ 35.)
8/27/18	Investigator reports to Mr. Birchall that Mr. Unsworth “has been traveling on and off to Thailand for cave exploration since the late 1980’s,” and Mr. Unsworth’s “behaviour is best described as a ‘Manther’ – UK slang for opposite of Cougar.” Mr. Birchall relays information to Mr. Musk. (SUF 55, 57; Birchall Decl. ¶ 13; Birchall Ex. D).
8/28/18	Mr. Musk tweets “You don’t think it’s strange he hasn’t sued me?” (SUF 58, Musk Ex. K).

<u>Date</u>	<u>Event</u>
Late Aug.	<p>Mr. Howard tells Mr. Birchall in telephone conversations that he learned that Mr. Unsworth spent significant time in Pattaya Beach, that Mr. Unsworth associated with other European expatriates who engaged in inappropriate sexual conduct in Thailand, and that that Mr. Unsworth was unpopular at the Thai Cave Rescue because others regarded him as “creepy.”</p> <p>Mr. Howard repeats his report that there is evidence suggesting that Mr. Unsworth met and began a relationship with his wife when she was eleven or twelve. Mr. Birchall reported this information to Mr. Musk.</p> <p>Mr. Birchall relays this information to Mr. Musk before August 30, 2018.</p> <p>(SUF 61, 64; Birchall Decl. ¶¶16-17; Musk Decl. ¶ 38-39).</p>
8/30/18	<p>The investigator issues report stating, among other things:</p> <ul style="list-style-type: none"> • “Mr. Unsworth has been a frequent visitor to Thailand since the 1980’s. Prior to meeting his current wife we believe that Mr. Unsworth was living in the Pattaya Beach...Pattaya Beach is synonymous with prostitution and scam artists. We are in the process of verifying this information which was mentioned to the lead investigator by Mr. Unsworth’s mother-in-law.” • “Mr. Unsworth has been described to our investigation team by other UK volunteers attached to the Cave Rescue team as a ‘Manther’ slang for an older man with a taste for younger women.” • “The sexpat whore-mongers his way through the go-go bars of Thailand. His only other friends are his sexpat peers. Peek-density occurs in and around Pattaya – Thailand’s sin city.” • “[S]ome of the UK and Dutch divers who also volunteered stated that Mr. Unsworth was not a popular or particularly liked man in the Cave Rescue Team. When pushed as to why, they simply replied ‘Creepy’” • “Mr. Unsworth is an unpopular loner” • “Mr. Unsworth is 63 years old. His wife we believe is 30...which would have put her at 18/19 when they first met.” <p>.</p> <p>(SUF 65; Birchall Decl. ¶¶ 19; Birchall Ex. F).</p>

<u>Date</u>	<u>Event</u>
8/30/18	<p>Mr. Musk emails BuzzFeed off-the-record and “on background” stating, among other things:</p> <ul style="list-style-type: none"> • Mr. Unsworth is “an old, single white guy from England who’s been traveling to or living in Thailand for 30 to 40 years, mostly Pattaya Beach” • “There’s only one reason people go to Pattaya Beach. It isn’t where you’d go for caves, but it is where you’d go for something else.” • “Most of the actual dive team refused to hang out with him. I wonder why...” • “Never saw Mr. Unsworth at any point. Was told he was banned from the site.” • “Stop defending child rapists” • Mr. Unsworth “mov[ed] to Chiang Rai for a child bride who was about 12 years old at the time.” <p>(SUF 69-87; Musk Ex. L).</p>
9/4/18	<p>BuzzFeed publishes Mr. Musk’s off-the-record and “on background” emails in their entirety.</p> <p>(SUF 98; Compl., Ex. K; Lifrak Ex. 26).</p>
9/17/18	<p>Mr. Unsworth sues.</p> <p>(SUF 99; Compl.).</p>